Kedah Cement Sdn Bhd v Masjaya Trading Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–1 OF 2005(K)
ABDUL MALEK AHMAD PCA, PS GILL AND ALAUDDIN FCJJ
31 MARCH 2006

Contract — Terms — Implied terms — Whether respondent had exclusive rights to perform services — Whether conduct of contracting parties could be relied upon to ascertain terms of written contract — Whether Court of Appeal was correct in relying upon conduct of contracting parties to construe terms of written contract

The appellant manufactured cement in Pulau Langkawi. It had to transport its cement from its factory onto ships that docked at the jetty at Telok Ewa for onward carriage. In 1984, the appellant engaged the respondent to transport the cement. It began as an informal arrangement but was eventually formalized in 1985. Thereafter, there were three subsequent agreements between the parties on basically the same terms, save for the issue of costs. Although not provided for in the written contracts, the practice had been that each time a shipment was due to arrive, the appellant would issue to the respondent a notice informing the respondent of the time, place of arrival of the ship and the number of bags of cement to be transported. The respondent worked on these terms until August 1986. In September 1986, the appellant unilaterally terminated the contractual relationship between the parties by way of a letter. The contracts did not expressly provide for their termination. The respondent contended that the termination was unlawful. The appellant then withdrew the letter of termination and instead invited the respondent to participate in a tender exercise held for the purpose of appointing contractors to do similar works as being done by the respondent. The respondent did not participate in the tender exercise. Consequently, the appellant identified two other companies to carry out the works done by the respondent. The main issue was whether it was proper for the Court of Appeal to have implied a term in the contracts that the respondent had the exclusive rights to perform the services in question. The Federal Court had also granted the appellant leave to appeal in respect of the following questions, namely: (1) whether the conduct of the contracting parties could be relied upon to ascertain the terms of the written contract; and (2) whether the Court of Appeal was correct in relying upon the conduct of the contracting parties to construe the terms of a written contract when the outcome of such construction goes against the established canons of interpretation of a written contract.

Held, allowing the appeal:

(1) To suggest that just because the respondent had gone out on a limb and taken out a bank loan, hired workers and paid them as an index of exclusivity of

services, was placing an undue importance on initial capital outlay in order to secure the contract. The Court of Appeal had also failed to realize that there was a dearth of evidence as to when the aforesaid steps were taken. The bank loan, hired workers, and lorries might very well have been obtained in 1984. It was not prudent of the respondent then (1984), to create the capital outlay on the assumption, that there was an exclusive appointment of service. No reasonable businessman would have been at that stage at least, presumptuous enough to assume so. The Court of Appeal's attempt to infer exclusivity of service based on the conduct of parties vis-a-vis, the three agreements was misplaced, as they had failed to consider the state of affairs prior to 1985. There was nothing in the evidence to suggest that the respondent was some feckless businessman, the weaker party, who was not aware of what he was getting into (see paras 24–25).

(2) The retraction of the letter of termination did not have relevance to the issue of exclusivity. The appellant had proffered a reason why the said letter was retracted. A challenge was imperative. The evidence of the appellant's witness stood for the moment, uncontradicted and cognizance should be taken of it. To that end, the reliance of the Court of Appeal on the impact of the letter of retraction as a ground for exclusivity, without considering the plausible and uncontradicted evidence of the appellant's witness impeached their findings on this issue (see paras 31, 33).

(3) There was nothing elicited in the cross-examination of the appellant's witnesses as to why they had abstained from appointing anyone else, despite the respondent's poor quality of work. There was no assertion by the respondent, that the appellant did not appoint anyone else, because there was an implied exclusivity of service. The appellant was not given the opportunity at trial, to state why they had not asserted their rights in such a manner over the three year period. This was a failing of the respondent who could have, in cross-examination of the appellant's witness ferreted an answer that perhaps may have assisted the respondent's claim. The inference of exclusivity drawn by the Court of Appeal of this evidence was flawed (see paras 34, 38–39).

(4) The conduct of the contracting parties could be relied upon to ascertain the terms of the contract. One should not be pedantic when approaching factual situations in cases of this nature. But, this endorsement comes with a caveat. The broad-brush approach cited by the Court of Appeal must be borne out, by cogent evidence and not based on mere posturing and conjecturing. Whilst a Court of Appeal may readily interfere with findings of fact of a trial judge which depend upon inferences drawn from other facts and form an independent opinion, such inferences must be borne out by cogent evidence adduced, and nothing short of this (see paras 42–44).

[Bahasa Malaysia summary

Perayu membuat simen di Pulau Langkawi. Ia perlu mengangkut simennya daripada kilangnya ke atas kapal-kapal yang berlabuh di jeti Telok Ewa untuk pengangkutan seterusnya. Pada tahun 1984, perayu telah melantik responden untuk mengangkut simen. Ia bermula sebagai satu urusan tidak rasmi tetapi akhirnya dirasmikan pada

tahun 1985. Berikutan itu, terdapat tiga perjanjian selanjutnya antara pihak-pihak berdasarkan terma-terma yang sama, kecuali berhubung isu kos. Meskipun tidak diperuntukkan dalam kontrak bertulis tersebut, amalannya setiap kali penghantaran dijangka tiba, perayu akan memberikan kepada responden notis memaklumkan responden tentang masa, tempat ketibaan kapal itu dan nombor beg-beg simen untuk diangkut. Responden telah bertugas berdasarkan terma-terma tersebut sehingga Ogos 1986. Pada bulan September 1986, perayu di satu pihak sahaja telah menamatkan hubungan kontraktual antara pihak-pihak melalui sepucuk surat. Kontrak-kontrak tersebut tidak menyatakan tentang penamatan mereka. Responden menegaskan bahawa penamatan tersebut tidak sah. Perayu kemudian menarik balik surat penamatan itu dan sebaliknya menjemput responden melibatkan diri dalam amalan tender yang diadakan bagi tujuan melantik kontraktor-kontraktor membuat kerja sama seperti responden. Responden tidak terlibat dalam amalan tender itu. Berikutan itu, perayu mengenalpasti dua buah syarikat lain untuk mengendalikan kerja yang dijalankan oleh responden. Isu utama adalah sama ada ia betul untuk Mahkamah Rayuan menyirat terma dalam kontrak-kontrak tersebut bahawa responden mempunyai hak eksklusif untuk melaksanakan perkhidmatan yang dipersoalkan. Mahkamah Persekutuan juga memberikan perayu kebenaran untuk merayu berkaitan persoalan berikut, iaitu: (1) sama ada perlakuan pihak-pihak yang terikat boleh digunakan untuk memastikan terma-terma kontrak bertulis; dan (2) sama ada Mahkamah Rayuan adalah betul berdasarkan perlakuan pihak-pihak yang terikat untuk mentafsirkan terma-terma kontrak bertulis jika keputusan pembentukan sedemikian bertentangan dengan prinsip pentafsiran tetap untuk kontrak bertulis.

Diputuskan, membenarkan rayuan tersebut:

(1) Untuk mencadangkan bahawa oleh kerana responden telah bersusah payah dan mengambil pinjaman bank, mengupah pekerja dan membayar mereka sebagai tanda perkhidmatan eksklusif, meletakkan kepentingan yang tidak berpatutan atas modal perbelanjaan permulaan bagi tujuan mendapat kontrak. Mahkamah Rayuan juga gagal untuk menyedari bahawa terdapat kekurangan keterangan berhubung bila langkah-langkah tersebut diambil. Pinjaman bank, pekerja upahan, dan lori tersebut mungkin telah diperoleh pada tahun 1984. Adalah tidak wajar untuk responden pada masa itu (1984), untuk membentuk modal perbelanjaan dengan andaian terdapat pelantikan perkhidmatan yang eksklusif. Tiada peniaga yang munasabah akan mengambil langkah tersebut, yang terlalu berani untuk mengandaikan sedemikian. Percubaan Mahkamah Rayuan untuk membuat inferens tentang perkhidmatan eksklusif berdasarkan perlakuan pihak-pihak vis-a-vis, tiga perjanjian tersebut disalahletak, kerana mereka telah gagal untuk menimbangkan keadaan urusan sebelum 1985. Tiada apa-apa dalam keterangan untuk mencadangkan bahawa responden adalah seorang peniaga yang lembap, pihak yang lemah, yang tidak sedar apa yang beliau hadapi (lihat perenggan 24–25).

(2) Penarikan balik surat penamatan tiada kaitannya dengan isu sifat eksklusif. Perayu telah memberikan alasan kenapa surat tersebut ditarik balik. Cabaran itu imperatif. Keterangan saksi perayu kekal sementara, tidak disangkal dan ini perlu diambil perhatian. Akhirnya, kebergantungan

Mahkamah Rayuan ke atas kesan surat penarikan balik sebagai alasan untuk sifat eksklusif tanpa menimbangkan keterangan saksi perayu yang munasabah dan tidak disangkal telah mencabar penemuan mereka berhubung isu ini (lihat perenggan 31, 33).

(3) Tiada apa-apa yang dapat dicungkil dalam pemeriksaan balas saksi-saksi perayu berhubung sebab mereka tidak melantik orang lain, meskipun kerja responden tidak berkualiti. Tiada penegasan oleh responden, bahawa perayu tidak melantik orang lain, kerana terdapat perkhidmatan bersifat eksklusif yang tersirat. Perayu tidak diberikan peluang semasa perbicaraan, untuk menyatakan kenapa mereka tidak menggunakan hak mereka secara sedemikian dalam tempoh tiga tahun itu. Ini menunjukkan kegagalan responden yang mungkin, dalam pemeriksaan balas saksi perayu dapat mencungkil jawapan yang mungkin boleh membantu dalam tuntutan responden. Inferens tentang sifat eksklusif oleh Mahkamah Rayuan berhubung keterangan ini adalah cacat (lihat perenggan 34, 38–39).

(4) Perlakuan pihak-pihak yang terikat boleh digunakan untuk memastikan terma-terma kontrak. Seseorang itu sepatutnya tidak terlalu teliti apabila berhadapan dengan situasi faktual dalam kes-kes bersifat sebegini. Namun, pengindorsan ini datang bersama kaveat. Pendekatan luas ini dipetik oleh Mahkamah Rayuan hendaklah mengandungi keterangan meyakinkan dan bukan berdasarkan keadaan dan tekaan semata-mata. Meskipun Mahkamah Rayuan bersedia untuk campur tangan dengan penemuan fakta hakim perbicaraan yang bergantung kepada inferens yang diperoleh daripada fakta-fakta lain dan membentuk pendapat berasingan, inferens sedemikian hendaklah terhasil daripada keterangan yang meyakinkan, dan tidak kurang daripada ini (lihat perenggan 42–44).]

Notes

For cases on impled terms in contract, see 3(2) *Mallals Digest* (4th Ed, 2003 Reissue) paras 4691–4735.

Cases referred to

Ata Management Consultants Sdn Bhd v Makmuran Sdn Bhd [1997] MLJU 446 (refd)

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517 (refd)

Mewah Plus Property Sdn Bhd v Kluang District Government Servants Co-operative Housing Society Ltd [2000] 2 MLJ 456 (refd)

Petroleum Nasional Bhd v Kerajaan Negeri Terengganu [2004] 1 MLJ 8 (refd)

Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors [2001] 1 MLJ 324 (refd)

Appeal from: Civil Application No 08–68 of 2004(K) (Court of Appeal, Kuala Lumpur)

Robert Lazar (Lai Wai Fong with him) (Shearn Delamore & Co) for the appellant.

Azhar bin Arman (Pawancheek Marican with him) (Arman-Yunus) for the respondent.

PS Gill FCJ (delivering judgment of the court):

[1] The Federal Court on 18 January 2005 granted the appellant leave to appeal in respect of the following questions:

(i) whether the conduct of the contracting parties could be relied upon to ascertain the terms of the written contract; and

(ii) whether the Court of Appeal was correct in relying upon the conduct of the contracting parties to construe the terms of a written contract when the outcome of such construction goes against the established canons of interpretation of a written contract.

[2] Hence we do not propose to dwell at length with the facts of the case, save to state some pertinent aspects for the sake of clarity.

[3] The primary facts of the present case are as follows.

[4] The appellant manufactures cement in Pulau Langkawi. It had to transport its cement from its factory onto ships that docked at the jetty at Telok Ewa for onward carriage. In 1984, the appellant engaged the respondent to transport the cement. It began as an informal arrangement but was eventually formalized in 1985.

[5] Thereafter, there were three subsequent agreements between the said parties on basically the same terms, save for the issue of costs.

[6] Although not provided for in the written contracts, the practice had been that each time a shipment was due to arrive, the appellant would issue to the respondent a notice informing the respondent of the time, place of arrival of the ship and the number of bags of cement to be transported.

[7] The respondent worked on these terms until August 1986. To interject, prior to August 1986, there were sporadic complaints by the appellant of the quality of services provided for by the respondent. But nothing came of these complaints, (the last complaint being made on 26 January 1986). The appellant entered into three subsequent agreements with the respondent, the last dated 9 January 1986.

[8] Matters came to a head in September 1986, when the appellant unilaterally terminated the contractual relationship between the parties by way of a letter. The respondent predictably reacted to this act of the appellant, and through its solicitors, contended that the termination was unlawful.

[9] The appellant then withdrew the said letter of termination and instead invited the respondent to participate in a tender exercise held for the purpose of appointing contractors to do similar works as being done by the respondent.

[10] Needless to say, the respondent took umbrage to this offer, for reasons that will be apparent later and did not participate in the tender exercise. Consequently, the appellant identified two other companies to carry out the works done by the respondent.

[11] Before we go any further, it is pertinent to note that we have scanned the terms of the contracts entered into by the respondent and appellant and find as a fact, that the contracts do not expressly provide for their termination. Flowing from this omission, there was equally no provision in the contracts for termination.

[12] Our main concern for the present, is whether it was proper for the Court of Appeal to have implied a term in the contracts that the respondent had the exclusive rights to perform the services in question.

[13] The learned trial judge was invited to consider this point in the court below and his reply was as follows:

> I agree with Cik Maidzuara that the parties in the present case do not have the 'special relationship' as stipulated by the Court of Appeal in *Datuk Yap Pak Leong*, and, hence, the contracts executed fall within Category II as defined in that case. Therefore, the question which this court should direct its mind to now is whether there is a need to imply terms to give the contracts efficacy. Based on the authorities cited and the facts of this case, the answer must be in the negative. Although witnesses from both parties did give evidence regarding the terms of the plaintiff's appointment, yet neither party raised complaints about the business efficacy of the contracts. Each party was able to carry out its part of the bargain. In view of this, I see no necessity for this court to imply any terms into the contracts. The contracts should be accepted and interpreted in their present form.
>
> Finally, I accept Cik Maidzuara's argument that if it was the intention of both parties that the appointment should be exclusive, then it would have been a very important term of contracts and such a term would have been incorporated in the contracts. The fact that such a term was not incorporated in the contracts only goes to show that the parties never intended the plaintiff to be the sole appointee. It follows that it would not be reasonable and equitable for this court to rule that such a term is implicit in the agreements.

[14] The Court of Appeal was at variance with the finding of the learned trial judge and its reasons for doing so will be referred to in the course of this judgment.

[15] Against this backdrop what is our view?

[16] We are well aware of the settled law that it is for the parties who intend to be bound by mutual obligations to make a contract for themselves and it is not competent for the court to make a contract for the parties which they did not in the first place see fit to make for themselves, or to import a covenant which does not arise by fair and necessary implication from the language they have used (see *Smith v Harwich Corp* (1857) 140 ER 572 at p 579).

[17] We do not propose to recite the relevant case laws on the aforesaid issues, for we can say with equanimity that any legal practitioner worth his salt, would be well versed with the relevant principles of law propounded in them.

[18] We are also not doubting for a moment, the proposition of law, that it is within the province of courts to take into account conduct of parties when entering into an agreement and their conduct during their tenure of the agreement, when inferring a term into the contract, that was for inexplicable reasons omitted, when the contract was drawn out. But, the key issue is how much of the conduct can be accepted and whether when viewed objectively such conduct amounts to a tacit acceptance of an inferred term.

[19] In coming to its conclusion in inferring exclusivity of service, the Court of Appeal had taken into account evidence that emerged during the trial to justify why it was reasonable to infer that the parties assumed that the respondent was to have exclusive rights to perform the services as prescribed in the contract. We say evidence advisedly, as we have our reservations on cogency of the said evidence. We will give our reasons for this observation, a little later in the judgment.

[20] In the context of the present set of facts, the Court of Appeal had virtually endorsed the submissions of the Learned counsel for the respondent/plaintiff that amounted to the appointment of the respondent being exclusive. This is what the Court of Appeal had to say:

> In the present case, the question is this: Based on the conduct of the parties did they intend that the contracts were to confer on the plaintiff the exclusive right to perform the service in question? In our judgment, based on all the circumstances of the case this question must receive an affirmative answer.
>
> Some of the more important circumstances were indeed drawn to the attention of the learned judge and finds mention in his judgment but they failed to impress him:
>
> > Encik Mayandi also submits that in the present case the Court should take into consideration the contractual requirements, the conduct of the parties and the plaintiff's position in the contractual relationship when construing the parties' three contracts. He pointed out that it was evident from the following that the appointment was intended to be exclusive:
> >
> > (i) that the plaintiff took a bank loan for the purpose of this contract;
> >
> > (ii) that the plaintiff was required to keep a large number of monthly paid workers;
> >
> > (iii) that the workers retained in this category were drivers, clerks, general workers and a mechanic;
> >
> > (iv) that the plaintiff was required to keep eight lorries hired from a mainland owner on standby whether or not there was work;
> >
> > (v) that the agreement of 16 November 1985 required the plaintiff to carry out various services;
> >
> > (vi) that the defendant immediately withdrew its termination letter upon the threat of a legal action founded on a wrongful termination of the contract.
>
> There are two additional facts that assist the plaintiff. We have already mentioned them in paragraph 3 of this judgment. But it is useful to recall them. First despite the defendant's complaints about the quality of the plaintiff's service, it did not appoint anyone else to do the work. Second, throughout the three year period, the defendant did not assert a right to appoint someone in addition to the plaintiff to perform the service.

> Therefore, when the evidence in this case is viewed as a whole, it reasonable supports the inference that the parties throughout the three year period proceeded on the common assumption that the plaintiff was to have the exclusive right to perform the services prescribed by the contracts. And that is the inference the learned judge ought to have drawn.

[21] Respectfully, it is this wholesale endorsement of the respondent counsel's submission without testing it against the evidence adduced that has caused us considerable anxiety. More of this, as we move on.

[22] The immediate question is whether viewed afresh, the conduct alluded to by the Court of Appeal, would amount to an inference by the parties that the respondent was to have exclusive rights to perform the services in question.

[23] To our minds, the steps taken as far as items (i), (ii), (iii) and (iv) referred to in the judgment of the Court of Appeal would have been run-of-the-mill steps taken by any contractor such as the appellant, when engaged to perform a piece of work of such a nature as required by the appellant.

[24] To suggest as the Court of Appeal had done, that just because the respondent had gone out on a limb and taken out a bank loan, hired workers and paid them, was an index of exclusivity of services, is with respect placing an undue importance on initial capital outlay in order to secure the contract. This aside, what the Court of Appeal may have failed to realize is that there is a dearth of evidence as to when the aforesaid steps were taken. It must be borne in mind that there was an agreement of sorts (not in written form) between the appellant and respondent in early 1984 as regards to the packing, stacking, and transporting of manufactured cement. This so called agreement was only formalized in October 1985 (the first written agreement). It is our considered view that the bank loan, hired workers, and lorries may very well have been obtained in 1984. To this we ask ourselves, was it prudent of the respondent then (1984), to create the capital outlay on the assumption, that there was an exclusive appointment of service. We think not. No reasonable businessman would have been at that stage at least, presumptuous enough to assume so. The Court of Appeal's attempt to infer exclusivity of service based on the conduct of parties vis-a-vis, the three agreements is misplaced, as they have failed to consider the state of affairs prior to 1985.

[25] We are in agreement with the learned trial judge that there was nothing in the evidence to suggest that the respondent was some feckless businessman, the weaker party, so to speak, who was not aware of what he was getting into. The finding of the learned trial judge in this respect deserves reproduction:

> After considering the evidence and submissions made, it is my view that the plaintiff has failed to prove its case. My reasons are as follows:
>
> Although the plaintiff had claimed that is was the weaker party, I find that there is no evidence to support this claim. On the contrary, there was, as I had just pointed out, the evidence of DW1 regarding the discussions between the parties on a company-to-company basis. As such I am of the view that Peninsular Land Development cited by the learned counsel for the plaintiff, and the submissions made in relation thereto are not applicable.

A **[26]** To reiterate, the steps taken by the respondent in respect of the initial capital outlay, would ordinarily have been taken by any transporter in order to carry out the services that they had held themselves out to be able to perform. A fortiori, the respondent was prepared to do so, in the absence of a formal agreement.

B **[27]** We are minded to say, that the respondent would not have been able to cut mustard in the first place, had they not had the necessary wherewithal for the service that they had undertaken to perform. They were seeking to reap profits from this venture, and did so to an extent, until the turn of events in 1986.

C **[28]** As to the letter of retraction dated 10 September 1986 by the appellant, once again the Court of Appeal had endorsed the submissions of the despondent counsel, that the letter was retracted only because of the threat of legal action by the solicitors of the respondent, for wrongful termination of the contract. This letter of retraction, by the Court of Appeal's account, was yet another string to the bow of exclusivity of service.

D

[29] We, however, find nothing in the said letter or evidence on print to justify such a finding. In fact, scant regard was given by the Court of Appeal to the evidence of defence witness DW1, who had said in evidence that the letter was withdrawn only because they felt there was no need to have sent a letter of termination in the

E first place, as this was not a contract in perpetuity (perjanjian yang berkekalan). The retort of the said witness, we find on scrutiny of evidence was not countered or challenged at all in the trial court. The counsel on record for the respondent did not deem it fit then, to clarify this response in his line of cross-examination. He was complacent enough to accept this retort. Herein, lies the error.

F

[30] To digress a little, it is an elementary rule of evidence that a party eliciting from a witness under cross-examination evidence unfavourable to his case, may seek to adduce evidence in rebuttal. It has also been emphasized repeatedly, through case laws of the need to cross-examine a witness on matters disputed that form the

G bedrock of the defence or plaintiff's case, respectively. Flowing from this proposition, a witness should be challenged in the witness box, or at any rate it should be made plain while the witness is in the box that his evidence is not accepted on material assertions. This we believe is not merely a technical rule of evidence but is a rule of essential justice.

H

[31] Reverting to the matter at hand, the retraction of the letter of termination does have relevance to the issue of exclusivity. The appellant has proffered a reason why the said letter was retracted. A challenge is imperative.

[32] Where does it leave the evidence?

I

[33] The evidence of DW1 stands for the moment, uncontradicted and cognizance should be taken of it. To that end, the reliance of the Court of Appeal on the impact of the letter of retraction as a ground for exclusivity, without considering the plausible and uncontradicted evidence of DW1 impeaches their findings on this issue.

[34] The Court of Appeal in affirming exclusivity of service has also emphasized the fact that despite complaints about the respondent's quality of work, the appellant had not appointed anyone else to do the work. In this respect, we find once again, that there was nothing elicited in the cross-examination of the appellants's witnesses as to why they had abstained from appointing anyone else, despite the respondent's poor quality of work. The only reference to quality of work of the respondent's company was elicited in the evidence of DW2, then again, only in the course of examination-in-chief, where the said witness candidly explained the problems they had with the respondent company and its workers. In fact, the response of DW2 deserves reproduction at p 427 of the record of appeal:

> Saya ada mengalami sedikit masalah dengan Masjaya mengenai kerja-kerja yang dibuat olehnya.
>
> Keadaan ketika itu — Langkawi masih belum dimajukan. Jadi untuk mendapatkan pekerja mahir adalah sukar. Ini dialami oleh pihak kilang dan pihak kontraktor. Disebabkan oleh demikian, pihak kilang dan juga pihak mana-mana kontraktor terpaksa member! bimbingan dan tunjuk ajar kepada pekerja-pekerja. Ini menyebabkan, pada permulaannya setiap pekerjaan tidak berjalan dengan baik, kerana pada setiap masa dan ketika, pihak pengurusan kilang ataupun mana-mana kontraktor yang menjalankan kerja di Pulau Langkawi amnya dan di Teluk Ewa khususnya terpaksa terus beri bimbingan kepada pekerja-pekerja itu'

[35] We find nothing in the course of cross-examination of the said witness any assertion by the respondent, that the appellant did not appoint anyone else, because there was an implied exclusivity of service.

[36] Pausing for a moment, we wish to state for the record that the doctrine requiring a testing of testimonial statement by cross-examination has always been understood as requiring not necessarily an actual cross-examination, but merely an opportunity to exercise the right to cross-examination if desired. The reason is that whenever an opponent has declined to avail himself of the offered opportunity to cross-examine, it must have supposed to have been because he believed that the testimony could not or need not be disputed at all or be shaken by cross-examination. This doctrine is perfectly settled. By the present doctrine, testimony never actually tested at all, in consequence of the carelessness, fraud, or incompetence of counsel, or of privity in interest is admitted, if merely the opportunity so to test it had existed (see *Sarkar of Evidence* (13th Ed) at p 1333).

[37] The respondent/plaintiff's counsel in the trial court we find should have had the wit and dexterity to pursue a response from the appellant about these matters. Alas, it was not done. And, without rebuttal evidence or a cross-examination of such a nature, this assertion of the respondent suffers a similar infirmity as alluded to in the caption from Sarkar quoted above. Viewed against this backdrop, the finding of the Court of Appeal in this respect is without support and should be set aside.

[38] It was also the observation of the Court of Appeal in favour of exclusivity, that the appellant had not in the three year period of contract with the respondent, asserted their right to appoint anyone else in addition to the respondent to perform the said service. Here again, the flaw was that the appellant was not given the

A opportunity at trial, to state why they had not asserted their rights in such a manner over the three year period. This again, was entirely a failing of the respondent/plaintiff's counsel who could have, in cross-examination of the appellant/defence's witness ferreted an answer that perhaps may have assisted the respondent's claim. In vain, this was not done.

B

[39] Once again, the inference drawn by the Court of Appeal of the piece of evidence is flawed, as it failed to consider the lack of opportunity given to the appellant to rebut this assertion. This flaw necessitates appellate intervention.

C **[40]** Where does it leave us?

[41] A stark choice. We are at odds with most of the findings of the Court of Appeal on reasons to infer exclusivity of services in the said contracts. That leaves us with only one valid recourse, and that is to allow the appeal.

D

[42] In answer to the questions posed before us, we agree to the issue framed before us that the conduct of the contracting parties could be relied upon to ascertain the terms of the contract. We equally agree to the sentiments expressed by the Court of Appeal that one should not be pedantic when approaching factual situations in cases E of this nature. But, this endorsement comes with a caveat.

[43] The broad-brush approach cited by the Court of Appeal below must be borne out, by cogent evidence and not based on mere posturing and conjecturing. Unfortunately, we find a surfeit of this in the judgment of the Court of Appeal, which F we are not prepared to condone.

[44] On a similar note whilst a Court of Appeal may readily interfere with findings of fact of a trial judge which depend upon inferences drawn from other facts and form an independent opinion, such inferences must be borned out by cogent G evidence adduced, and nothing short of this. This is axiomatic. See *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517.

H **[45]** With reference to conduct, we find no popular support within our local shores that subsequent conduct can be used for the purpose of interpreting a contract retrospectively. See *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8, *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2001] 1 MLJ 324 (CA) affirmed by the Federal Court; *Mewah Plus Property Sdn Bhd v Kluang District Government Servants Co-operative Housing* I *Society Ltd* [2000] 2 MLJ 456 (CA) and *Ata Management Consultants Sdn Bhd v Makmuran Sdn Bhd* [1997] MLJU 446).

[46] In any event, we find that the application of subsequent conduct by the Court of Appeal, against the factual matrix of the case, is totally misconceived.

[47] Having held there was no exclusivity of service, it follows by this reasoning that there was no requirement on the part of the appellant to have served a termination notice on the respondent. On this ground, we hold that there was no breach on the part of the appellant. To that end, the observations of the Court of Appeal on this notice procedure is erroneous and liable to be set aside.

[48] Appeal allowed with costs. Deposit to be refunded to appellant.

[49] My learned brothers, Abdul Malek Ahmad PCA and Alauddin FCJ have read the draft of my judgment and have expressed their agreement with it.

Appeal allowed.

Reported by Peter Ling